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Supreme Court, U.S.
FILED
DEC 13 1984
ALEXANDER L. STEVAS
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No. 84-432

In the Supreme Court of the United States

OCTOBER TERM, 1984

VITO MIRABILE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was denied a fair trial by the allegedly antagonistic pro se defense presented by his co-defendant and by the admission of handwritten records and testimony about drug transactions other than those charged in the indictment.

1. Following a jury trial in the United States District Court for the Eastern District of New York, petitioner and co-defendant Joel Levine were convicted on one count of conspiracy to distribute heroin and cocaine, in violation of 21 U.S.C. 846. Petitioner was sentenced to nine years' imprisonment and fined $5,000. The court of appeals affirmed by unpublished judgment order (Pet. App. 1a-3a).

The pertinent facts are not in dispute. On June 2, 1983, petitioner and Levine were tape-recorded negotiating the sale of one ounce of heroin to a DEA informant. Petitioner and Levine demanded that the informant pay $9,000 in

advance of delivery of the heroin. The informant made the payment on June 23, 1983, but petitioner and Levine made excuses for delaying delivery of the heroin and had not made delivery at the time of their arrests. Petitioner's defense was that he never intended to deliver the heroin but intended instead to "rip off" the informant, who owed petitioner money. The government bolstered its contention that petitioner and Levine were in fact engaged in a genuine drug distribution conspiracy by introducing, inter alia, petitioner's handwritten diaries chronicling his prior drug trafficking activity (which were found in a search of Levine's apartment). The government also introduced evidence that weapons, traces of cocaine, and drug paraphernalia were found in a search of Levine's apartment, and that traces of cocaine were found in a search of petitioner's car.

In the midst of trial, Levine sought to discharge his appointed counsel and to proceed pro se thereafter. The district court cautioned against such a course and initially denied the request. But when Levine persisted in his request and it became clear that he and his counsel were at loggerheads as to the defense tactics to be employed, the district court allowed him to represent himself, with assigned counsel acting as standby counsel.

In his defense Levine called the informant as a witness and sought to prove the absence of a conspiracy between himself and petitioner and also that the transaction with the informant had been a "rip-off" rather than a drug sale. The informant's testimony actually tended to incriminate both petitioner and Levine. The court charged the jury that petitioner and Levine, as members of an alleged two-man conspiracy, could both be convicted or both acquitted, but that a split verdict was not possible.

2. Petitioner argues (Pet. 12-17) that Levine's pro se defense was so antagonistic to his own defense that the district court should have granted his mid-trial motion for

severance.[1] This claim does not withstand scrutiny. If a severance had been granted, the government could nevertheless have adduced the informant's testimony that incriminated petitioner at a separate trial of petitioner. See *United States* v. *Tombrello*, 666 F.2d 485, 492 (11th Cir.), cert. denied, 456 U.S. 994 (1982). Beyond this, the flaw in petitioner's argument is that the two defenses were not directly antagonistic. Both petitioner and Levine presented the "ripoff" defense. And to the extent that Levine tried to negate the conspiracy by excluding himself from any drug transaction, that defense had no tendency to incriminate petitioner *on the conspiracy offense charged.* Accordingly, the defenses of petitioner and Levine were not mutually exclusive and did not require a severance. See *United States* v. *DeSimone*, 660 F.2d 532, 540-542 (5th Cir. 1981), cert. denied, 455 U.S. 1027 (1982); *United States* v. *Grapp*, 653 F.2d 189, 193 (5th Cir. 1981). It is only when one co-defendant becomes "the government's best witness against the other" that clearly antagonistic defenses exist. *United States* v. *Crawford*, 581 F.2d 489, 492 (5th Cir. 1978). Here, petitioner has wholly failed to demonstrate the type of compelling prejudice that would warrant holding that the district court abused its discretion in denying the motion for severance. See *United States* v. *Thomas*, 676 F.2d 239, 243

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[1] In the circumstances of this case the court acted well within its discretion in allowing Levine to proceed pro se. *Faretta* v. *California*, 422 U.S. 806 (1975). See also *United States* v. *Sacco*, 563 F.2d 552, 556-557 (2d Cir. 1977), cert. denied, 434 U.S. 1039 (1978).

Petitioner contends (Pet. 11) that this case presents an issue of first impression concerning the district court's responsibility to prevent prejudice to a defendant when a co-defendant is permitted to proceed pro se. But he has not explained how the question presented concerning allegedly antagonistic defenses is altered by the pro se status of the co-defendant. We note that the court of appeals did not deem it necessary to address petitioner's antagonistic defenses contention in its judgment order. See Pet. App. 3a.

(7th Cir. 1980); *United States* v. *Berkowitz*, 662 F.2d 1127, 1132 (5th Cir. 1981); *United States* v. *Sellers*, 658 F.2d 230, 231 (4th Cir. 1981).

3. Petitioner also contends (Pet. 18-24) that the trial court erred in admitting testimony reflecting that the informant had prior drug dealings with petitioner, and by allowing introduction in evidence of handwritten records of drug transactions compiled by petitioner that were found in a search of Levine's apartment. Petitioner's claim (Pet. 12, 18-21, 23) is that the court of appeals departed from its own precedents in sustaining these evidentiary rulings. These contentions warrant no further review.

a. In response to cross-examination of one of the DEA agents emphasizing the informant's failure to secure a sample of the heroin prior to advancing the payment of $9,000, the prosecution asked the agent on redirect why he had not directed the informant to secure such a sample. The agent testified that the informant and Mirabile "had done prior business before" (Tr. 417). Petitioner's counsel objected to the exchange on hearsay grounds, but did not argue that this was impermissible "similar acts" evidence or seek a limiting instruction. See Fed. R. Evid. 103(a)(1). Even assuming that petitioner had preserved all the objections he now advances, there was no error in admission of the agent's testimony, because it was a proper response to the line of examination employed by petitioner. Moreover, contrary to petitioner's assertion (Pet. 19), the disputed testimony does not, on its face, report an out-of-court declaration by the informant; petitioner's claim (Pet. 22) that the agent's testimony was hearsay is thus unfounded. Moreover, even if the agent's testimony could be understood to imply that the informant had told him of prior dealings with petitioner, the hearsay objection must fail because, wholly apart from its truth value, the implicit declaration was relevant to explain the agent's conduct,

which had been the subject of cross-examination. Cf. *United States* v. *Abel*, No. 83-935 (Dec. 10, 1984), slip op. 10. Absent any request for a limiting instruction in this regard, petitioner's present claim is untenable.

b. Petitioner claims (Pet. 22-24) that his notebooks recording drug transactions related to matters outside the scope of the conspiracy charged and that they were inadmissible as similar acts evidence. Again petitioner's claim is that the unpublished judgment order of the court of appeals is inconsistent with recent Second Circuit precedent.

The court of appeals held that the diaries reflected petitioner's intent and state of mind, and that like other tools of the drug trade found at petitioner's co-defendant's apartment, they tended to show the existence of the charged conspiracy (Pet. App. 2a). The court of appeals rejected petitioner's characterization of the notebooks as hearsay, noting that their evidentiary value did not depend upon the truth of entries contained in them, but upon the very presence of a ledger of this kind, compiled by petitioner, along with other drug paraphernalia, in his co-defendant's apartment. The decision of the court of appeals — the rationale of which is ignored by petitioner — is clearly correct. Indeed, because the diaries effectively linked petitioner and his co-defendant in drug trafficking they are not merely similar act evidence. In any event, to the extent that petitioner may complain that the notebooks were admitted as part of the government's case-in-chief, rather than after the close of the defense case (cf. Pet. 21), the objection is frivolous in the setting of this case because the claim that petitioner did not intend to distribute heroin was the centerpiece of petitioner's defense. As the court of appeals observed (Pet. App. 2a), any error here was harmless

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1984

DOJ-1984-12